UNITED STATES
v.
MARY S. NAPOUK

IBLA 80-880 Decided February 8, 1982

Appeal from decision of Chief Administrative Law Judge L. K. Luoma, rejecting Native allotment application AA-6007.

Vacated; protest dismissed.

1. Alaska: Native Allotments

In sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve--Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Failure to provide adequate evidence of use and occupancy does not bar approval of an allotment application under that provision. Where such an application has been rejected, the case will be remanded to the Alaska State Office to be held for approval pursuant to sec. 905 of the Alaska National Interest Lands Conservation Act, subject to the filing of a protest before the end of the 180-day period.

2. Alaska: Native Allotments

In sec. 905(a)(5)(A), (B), and (C) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435,

> (1980), Congress provided that paragraph (1) of this subsection and subsection (d) shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the 180th day following the effective date of this Act the State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist. However, where the State's protest describes land which is clearly different from the land claimed by the Native applicant, the Board will instruct BLM to grant the allotment, provided all else is regular.

APPEARANCES: James E. Hutchins, Esq., Alaska Legal Services, Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On July 21, 1970, the Bureau of Land Management (BLM) received appellant's Native allotment application and evidence of use and occupancy for approximately 100 acres of land located on the Alaska peninsula in the Chignik area. 1/ The application is for three parcels containing 40, 20, and 40 acres respectively, identified as parcels A, B, and C.

On September 11, 1979, BLM filed a complaint in accordance with Title 43, Code of Federal Regulations, Part 4, Subpart E, alleging that Mary S. Napouk had failed to show sufficient proof of substantially

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1/ Parcel "A" contained approximately 40 acres and was located in T. 43 S., R. 61 W., Seward meridian. Parcel "B" contained approximately 20 acres and was located in T. 45 S., R. 61 W., Seward meridian. Parcel "C" contained approximately 40 acres and was located in T. 45 S., R. 60 W., Seward meridian.

continuous use and occupancy by herself for a period of 5 years as required by the Act of May 17, 1906 (34 Stat. 197), as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970).

On September 29, 1979, Napouk submitted her timely answer to the complaint wherein she requested a hearing in the city of Anchorage.

A hearing was held before Chief Administrative Law Judge Luoma on April 15, 1980. BLM presented three witnesses, Gerald L. Yeiter, a realty specialist, and Robert F. Wiseman, a natural resources specialist, who examined parcels A and B; and William E. Ireland, a realty specialist, who examined parcel C. Napouk was not present at the hearing but was represented by counsel. No witnesses were called in her own behalf. Napouk had asserted in her application, however, that the sites had been used seasonally for fishing and berrypicking from August 1965 up to and including the date of application.

Mary Napouk appealed the decision of Judge L. K. Luoma, dated July 30, 1980, which rejected her Native allotment application, AA-6007, in its entirety.

[1, 2] On December 4, 1981, the parties filed a stipulation that pursuant to the Board's ruling in Stanislaus Mike, 56 IBLA 69 (1981), and the withdrawal of protests by the State of Alaska, exhibit A, 2/ the complaint should be dismissed as to parcels A and C of the Native allotment application AA-6007. The parties further stipulated that those parcels should proceed to legislative approval pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371, 2435 (1980). In the stipulation, the parties further requested that the Board require a determination of the validity of the protest by the State of Alaska concerning parcel B of AA-6007, exhibit B. 3/ Appellant further requests that this Board make this determination. BLM does not oppose this request but takes no position regarding the propriety of a determination by the Board, at this time, of the validity of the State of Alaska's protest. In the alternative, the parties request that the Board remand the adjudication concerning appellant's right to an allotment of parcel B to BLM so that BLM may determine the validity of the protest.

2/ Exhibit A attached to the stipulation was a copy of a letter from the State of Alaska, Department of Natural Resources, to BLM dated Nov. 20, 1981. In the letter the State indicated that it was withdrawing its protest which had been timely filed pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act, insofar as it related to parcels A and C of AA-6007. Parcel B remained under protest.

3/ Exhibit B attached to the stipulation is a copy of the protest of AA-6007 filed by the State. The protest alleges that the land described in the application is used as an "existing airstrip" and an "existing trail." The protest further alleges that there is no reasonable alternative for access in existence.

We must first consider the following provision of ANILCA, 94 Stat. 2371, 2435, enacted on December 2, 1980:

> Sec. 905(a)(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.
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> (5) Paragraph (1) of this subsection and subsection (d) shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, if on or before the one hundred and eightieth day following the effective date of this Act--
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> (B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist;
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Other paragraphs of section 905 describe circumstances under which the application would remain subject to adjudication under the Native Allotment Act, 43 U.S.C. §§ 201-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976).

As to parcels A and C, it appears that the only circumstance which would have barred automatic approval was the protest filed by the State of Alaska. Since the parties have stipulated that the State has withdrawn the protest as to parcels A and C, the decision appealed from is vacated as to those parcels, and the BLM State Office should hold the application as to those parcels for approval, subject to any other action which may have arisen before the end of the 180-day period which would preclude approval under subsection 905(a)(1) and require adjudication pursuant to the provisions of the Native Allotment Act in accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

In his July 30, 1980, decision, Judge Luoma found:

> Parcel B: Parcel B, consisting of approximately 20 acres of land, is located on the south end of Chignik Lake about 3 boat miles from Chignik Lake Village (Tr. 31, 41, 49-50, 71; Exhs. 5, 6). As they did for Parcel A, Mr. Yeiter and Mr. Wiseman, along with Mr. Lind and Mr. Bone, flew slowly several times low over the entire parcel by helicopter. They did not, however, walk over Parcel B except to pace the distance along the shoreline where they felt there would be the most evidence of use and occupancy (Tr. 9, 16, 46-47). They had no problem identifying the land claimed in contestee's application (Tr. 10, 32).
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> The vegetation of Parcel B is similar to that of Parcel A: alder, grass, and berries (Tr. 17, 42, 44: Exh. 8). Mr. Wiseman stated in his opinion the parcel was not very good for berrypicking (Tr. 43). Unlike Parcel A, Mr. Yeiter did observe some game trails on Parcel B (Tr. 26). As far as fishing in Chignik Lake is concerned, both Mr. Yeiter and Mr. Wiseman testified that it would be better than in Black Lake (Tr. 25, 33). But when asked how fishing in Chignik Lake compared to fishing in Chignik Lagoon, both men stated that it was better in the Lagoon (Tr. 25, 44).
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> In examining the parcel for evidence of use and occupancy, the men were looking for the same things as they were on Parcel A, disturbances and materials left behind (Tr. 11, 18, 33, 54). Both Mr. Yeiter and Mr. Wiseman testified that no such evidence was found by any of the men (Tr. 13-14, 47-48). But again, the same information that could explain this lack of visible evidence was brought out on cross-examination with regard to Parcel B.

Decision at 5.

The information which could explain lack of visible evidence was noted by Judge Luoma as follows:

> In examining the parcel for evidence of use and occupancy, Mr. Yeiter, Mr. Wiseman, and Mr. Lind were looking for disturbances such as a campfire, a garbage pit, a cutdown area or a human trail, or for materials left behind such as fish drying racks, a lean-to, or a tent (Tr. 11, 18, 33, 54). Both Mr. Yeiter and Mr. Wiseman testified that none of the men found any such evidence (Tr. 13-14, 47). Several things were brought out on cross-examination, however, that could explain this lack of visible evidence: (1) the Natives usually follow the game trails so it is not unusual not to find evidence of humanmade trails (Tr. 20); (2) if the Natives travel a distance by boat to berrypick and fish it is possible that they would camp in their boat rather than on shore thereby leaving very little evidence of their use of the land and waters (Tr. 33); and (3) any cleared areas could possibly have grown over and evidence destroyed by the harsh northern climate in the 3-year period between the time contestee claimed use and occupancy of the parcel and the field examination (Tr. 18-19, 54). [Footnote omitted.]

Decision at 4.

The protest filed by the State of Alaska on April 24, 1981, described the land on which it claims an easement for a public campsite (parcel B). The State noted that the land has been used in the past by local residents, guides, and hunters seeking fish and game and that the area is presently heavily utilized by the public to hunt big game and sport fish during the seasons. The State noted in the protest that the level of use is anticipated to increase rapidly as other resources in the area are developed (oil and mineral) and that recreational use of the area by residents of other areas (big game, waterfowl, and fishing) is increasing. The State further noted that the purpose and justification for the easement is to allow continued use of boat tieup, float plane tieup, and overnight camping sites at the outlet of Black Lake, upper end of Chignik Lake, head of Portage Bay, and mouth of Metrofania Creek, and at mouth of Alec River, as well as to allow continued use of the big game, fur animals, and sport fishing in the area. The State's protest asserted that no reasonable alternative for access exists because the area is an existing constructed public access route, transportion facility, or corridor. The protest also asserts that an airstrip exists on the site.

However, it is apparent that although the State's protest is directed against allowance of appellant's application for parcel B, it describes a different tract of land. Parcel B is described in the allotment application as being in "Township 45 South, Range 61 West,

Seward Meridian." Judge Luoma described parcel B as "located on the south end of Chignik Lake about 3 boat miles from Chignik Lake Village." (Dec. at 5). However, the State's protest indicates that the campsite on Chignik Lake is to be located in sec. 2, T. 45 S., R. 62 W., Seward meridian. The protest further describes the purpose of the easement as allowing "continued boat tie-up, float plane tie-up and overnight camping sites at the . . . upper end of Chignik Lake." Resort to a topographic map produced by the Geological Survey reveals that the upper one-third of Chignik Lake is located in T. 45 S., R. 62 W., whereas the lower two-thirds of the lake lie in T. 45 S., R. 61 W. Further evidence that the tract described by the protest is not the land described as parcel B are the obvious discrepancies in use and improvement related in the protest. Examination of parcel B by BLM personnel disclosed no sign of human use or improvement whatever; only game trails. The protested tract is said to have an airstrip, a trail, and to experience substantial use by the public. Clearly, we are concerned here with two different tracts of land.

As pointed out by appellant, a protest by one who was not a party to the decision would normally be remanded to BLM for a decision on the merits of the protest before this Board would consider it. Elaine Mikels, 41 IBLA 305 (1979). This procedure has been waived, however, where a remand would constitute a sterile exercise merely for the sake of form. Julie Adams, 45 IBLA 252, 254 (1980). This is such a case. We find that the State's protest is legally insufficient, and that it cannot qualify as a statutory barrier against legislative approval for the allotment of appellant's parcel B pursuant to section 905 of ANILCA, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated, the protest of the State of Alaska is dismissed, and the case is remanded to BLM for further action consistent with this opinion, all else being regular.

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Edward W. Stuebing
Administrative Judge

We concur:

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Bernard V. Parrette
Chief Administrative Judge

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Bruce R. Harris
Administrative Judge